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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ARTURO BAEZA, JR., Defendant and Appellant.	B208628 (Los Angeles County Super. Ct. No. KA043834)

APPEAL from a judgment of the Superior Court of Los Angeles County. Wade D. Olson, Judge. Modified in part; affirmed in part.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Arturo Baeza waived his right to a jury trial and pled guilty to one count of attempted forcible rape in violation of Penal Code sections 664 and 261, subdivision (a)(2). This guilty plea was entered on July 20, 1999. The court sentenced appellant to the middle term of three years in state prison, but suspended sentence and placed appellant on probation for five years, on the conditions, inter alia, that he serve one year in county jail and pay a restitution fine.

On December 1, 1999, appellant was deported to Mexico. The court revoked his probation and issued a bench warrant for his arrest. On March 10, 2008, appellant was brought to court on the warrant. On May 30, 2008, following a hearing, the court found that appellant had violated his probation. The court revoked probation and imposed the previously suspended sentence of three years in state prison.

Appellant appeals from the judgment of conviction, contending that the trial court erred in revoking probation, and in imposing restitution and parole revocation fines. We order the probation revocation fine stricken, and affirm the judgment of conviction in all other respects.

Facts

The facts of the underlying offense are not relevant to the issues raised on appeal and are omitted.

Discussion

1. Probation revocation

Appellant contends that his failure to comply with the conditions of his probation was not willful, and so the trial court erred in revoking his probation. We do not agree.

A court may revoke a defendant's probation if the court finds by a preponderance of the evidence that the defendant willfully violated a condition of probation. (*People v. Galvan* (2007) 155 Cal.App.4th 978, 982.)

A trial court's ruling revoking probation is reviewed for an abuse of discretion. (*People v. Self* (1991) 233 Cal.App.3d 414, 417.)

Here, appellant was required to notify probation of his address at all times. Payment of certain fines and fees was also one of the terms of appellant's probation. It is undisputed that appellant did not notify the probation department of his address once he was deported, and did not make any payments on his fines and fees.

Appellant contends that these failures were not willful. He testified that his papers with the contact information for the probation department were taken from him when he was deported and so he was unable to contact the probation department from Mexico.

To support his argument that his acts were not willful, appellant relies on *People v. Sanchez* (1987) 190 Cal.App.3d 224. His reliance on *Sanchez* is misplaced. The court in *Sanchez* stated: "[I]n the typical case, an illegal alien will have at best limited ties to the general community and, upon deportation, such ties to the community as do exist will necessarily be terminated. Obviously a convicted illegal alien felon, upon deportation, would be unable to comply with any terms and conditions of probation beyond the serving of any period of local incarceration imposed." (*Id.* at p. 231.)

Appellant focuses on the second sentence concerning the difficulties of compliance and contends that it was impossible as a matter of law for him to comply with the conditions of his probation. We question *Sanchez's* conclusion that a deported alien will be unable to comply with *any* condition of probation. We see no bar to an alien's notifying the department of his address in his country of origin, for example, or sending payments for fees and fines from his country of origin. Even assuming for the sake of argument that the *Sanchez* court's conclusion holds true for the deported aliens described in that case, appellant ignores the fact that his is not the "typical case" described in the above-quoted excerpt from *Sanchez*. Unlike the aliens described in *Sanchez,* appellant had and continues to have strong ties to the community. His family remained in the U.S. after he was deported. He had a cousin in the U.S. who had hired, or assisted appellant in hiring, the private attorney who represented him in this matter in 1999. Appellant could have contacted his wife or cousin for assistance in obtaining probation department contact information. He did not do so.

Even assuming for the sake of argument that appellant's failure to report to probation, to provide his address in Mexico and to pay his fines and fees were not willful, appellant's illegal return to this country would provide a basis for revoking his probation. Appellant was ordered to obey all laws as a condition of his probation.

Appellant contends on appeal that "he was picked up at the proper and legal location for entering the United States. There is no evidence that appellant was trying to sneak into the country or that he was trying to evade the authorities in doing so." Appellant is mistaken. At the probation revocation hearing, appellant was asked: "Were you arrested at San Ysidro trying to enter the United States?" He replied: "I don't remember the city because I was arrested in the hill." Appellant was then asked: "So you never actually made it to any city?" He replied: "Never."

2. Fines

Appellant contends that the trial court erred in imposing a restitution fine of $200 and a probation fine in the same amount. We agree in part.

At the original sentencing hearing, the trial court imposed a $200 restitution fine pursuant to Penal Code section 1202.4. At the conclusion of the probation revocation hearing, the trial court stated that appellant was ordered to pay a $200 restitution fine.

Appellant contends and respondent agrees that only one such fine may be imposed in a case. We agree as well. (See, e.g., *People v. McElroy* (2005) 126 Cal.App.4th 874, 881.)

Respondent suggests that the trial court was re-instating the restitution fine previously imposed as a condition of probation, a fine which appellant never paid, resulting in only one fine. Respondent appears to be correct. The abstract of judgment dated June 2, 2008 shows a restitution fine in the amount of $200 imposed pursuant to Penal Code section 1202.4. The abstract should be the controlling document on this matter. To the extent that the transcript or minute order of the sentencing hearing suggests that a second restitution fine has been imposed, any such second fine is stricken.

Appellant contends that the probation revocation fine imposed pursuant to Penal Code section 1202.44 violates the California and United States ex post facto laws. It appears that appellant is correct.

Appellant was convicted of the current offense in 1999. Penal Code section 1202.44 became effective on August 16, 2004.

An ex post facto law is a retrospective statute which makes the punishment for a crime more burdensome. (*Collins v. Youngblood* (1990) 497 U.S. 37, 41-42.) A fine is punishment. (*U.S. v. Bajakajian* (1998) 524 U.S. 321.)

Respondent points out that a probation revocation fine comes into effect only when probation is violated, and that the probation violation and revocation occurred after Penal Code section 1202.44 became law. Appellant's first probation violation occurred in late 1999 or early 2000, before section 1202.44 was enacted. Further, our colleagues in Division Seven of this District Court of Appeal have rejected a similar argument that ex post facto laws should not apply to a parole revocation fine when the parole violation occurred after the enactment of the statute creating the fine. The Court explained that a parole revocation fine is attributable to the original conviction. Thus, "the ex post facto clause forbids imposing a parole revocation fine on a parolee who committed the underlying crime prior to the enactment of the fine." (*People v. Callejas* (2000) 85 Cal.App.4th 667, 678; see *Johnson v. U.S.* (2000) 529 U.S. 694, 701.) The same logic should apply to a probation revocation fine. Thus, the probation revocation fine is ordered stricken.

Disposition

The probation revocation fine of $200 is ordered stricken. The clerk of the superior court is instructed to prepare an amended abstract of judgment reflecting this change and to deliver a copy to the Department of Corrections and Rehabilitation. The judgment of conviction is affirmed in all other respects.

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.